

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 103 OF 2004
IN
NOTICE OF MOTION NO. 1938 OF 1994
IN
TEST. PETITION NO. 545 OF 1992

Sardar Darshan Singh S/O Sahib Dittamal.. Deceased

Labhsingh Daya Singh .. Petitioner
Versus
Sardar Tarasingh Bhaisahib Dattamal
and others .. Applicants

Mr.S.S. Purohit i/b Wadia Gandhi & Co. for the
Petitioner.

Mr. S.H. Doctor with Mr. Sawant i/b Dhruve Liladhar
& Co. for the Applicants.

CORAM : S.K. SHAH, J.
DATED : 21.10.2004.

P.C. -

1. By this Notice of Motion the applicant seeks restoration of Notice of Motion No. 1938 of 1994 which came to be dismissed for default by order dated 28.8.2003 for want of prosecution as none appeared on behalf of the applicant.

2. Heard Learned Counsels on both the sides and also perused the Notice of Motion and affidavit in support thereof. It appears that by order dated 10.2.1995 the Notice of Motion No.1938 of 2004 was directed to be proceeded with the recording of evidence in that Notice of Motion. The matter was adjourned from time to time for that purpose, however, no evidence was recorded. The last date before the order of dismissal was passed was 24.7.1993. That was before Shri. D.G. Deshpande, J. The applicant was represented before the Court on that day and thereafter the Notice of Motion was adjourned to 28.8.2003. What is mentioned in the affidavit in support of the Notice of Motion for restoration is that the Advocate for the applicant could not remain present before the Court as his name was not shown on the board because no Vakalatnama was filed. It appears that the learned Advocate was representing the applicant right from 1995, however, without filing Vakalatnama and on all the dates he was attending the Notice of Motion for and on behalf of the applicant.

3. It appears that on 28.8,2003 when the Notice of Motion came to be dismissed, it was not matter that the applicant and his advocate were not appearing before the Court on earlier dates. That was a single instant when the learned Advocate for the applicant was absent when the Notice of Motion came

to be dismissed for default. It was the mistake of Advocate that he was not appearing before that Court on that day. However, party should not suffer for the mistake of advocate.

4. Under these circumstances, Notice of Motion No.103 of 2004 is allowed and the Notice of Motion No.1938 of 1994 shall stand restored to file with the cost of Rs.1000/-.

5. S.O. for one week.

[S.K.SHAH, J.]